



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

# HARVARD LAW REVIEW.

---

VOL. XV.

APRIL, 1902.

NO. 8

---

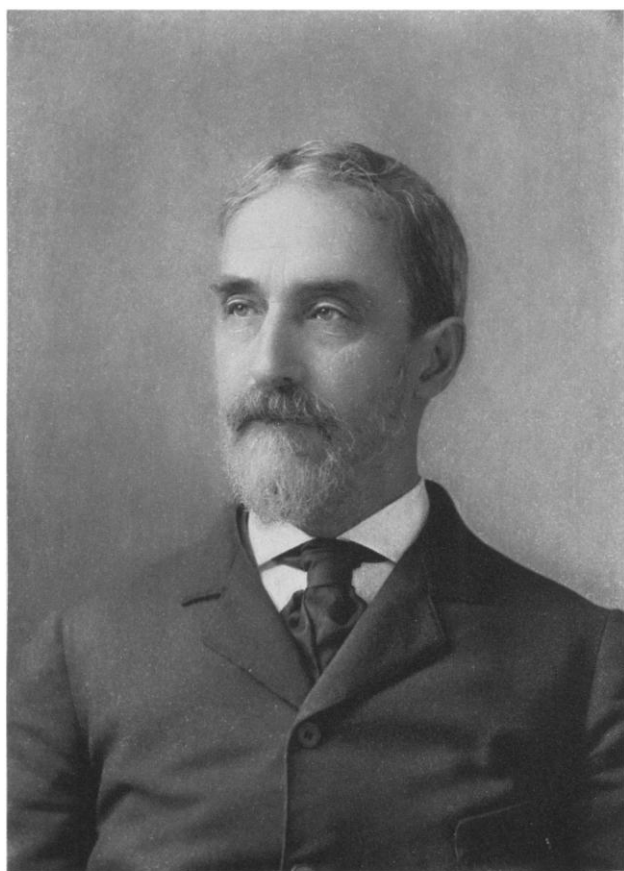
JAMES BRADLEY THAYER.<sup>1</sup>

IT was my privilege to be a colleague of Professor Thayer throughout the twenty-eight years of his law professorship. Before his return to the Harvard Law School he had declined the offer of a professorship in the English Department of the College. Although his rare gift for thoughtful, graceful, and effective writing could not have failed to make him highly successful as a professor of English, his decision not to give up his chosen profession was doubtless a wise one. Certainly it was a fortunate one for the Law School and for the law.

During the early years of his service he lectured on a variety of legal topics, but Evidence and Constitutional Law were especially congenial to him, and in the end he devoted himself exclusively to these two subjects, in each of which he had prepared for the use of his classes an excellent collection of cases. Evidence was an admirable field for his powers of historical research and analytical judgment. He recognized that our artificial rules of evidence were the natural outgrowth of trial by jury, and could only be explained by tracing carefully the development of that institution in England. The results of his work appeared in his "Preliminary Treatise on the Law of Evidence," a worthy companion of the masterly "Origin of the Jury," by the distinguished German,

---

<sup>1</sup> Of these appreciations of Professor Thayer by his colleagues the first and third were prepared for the February meeting of the Colonial Society of Massachusetts, and the second for the March meeting of the Massachusetts Historical Society.



*A. W. Lison & Co., Boston.*

*J. B. Thayer.*

Professor Brunner. His book gave him an immediate reputation, not only in this country, but in England, as a legal historian and jurist of the first rank. An eminent English lawyer, in reviewing it, described it as "a book which goes to the root of the subject more thoroughly than any other text-book in existence."

Only a few days before his death Professor Thayer talked with me about his plans for the future, saying that he expected to complete his new book on Evidence in the summer of 1903, when he meant to relinquish that subject and devote the rest of his life to Constitutional Law, with a view to publication.

It is, indeed, a misfortune that these plans were not to be carried out. But although he has published no treatise upon Constitutional Law, he has achieved, by his essays, by his Collection of Cases, and by his teaching, a reputation in that subject hardly second to his rank in Evidence. To the few who knew of it, President McKinley's wish to make Professor Thayer a member of the present Philippines Commission seemed a natural and most fitting recognition of his eminence as a constitutional lawyer, and, if he had deemed it wise to accept the position offered to him, no one can doubt that the appointment would have commanded universal approval.

Wherever the Harvard Law School is known, he has been recognized for many years as one of its chief ornaments. When, in 1900, the Association of American Law Schools was formed, it was taken for granted by all the delegates that Professor Thayer was to be its first president. No one can measure his great influence upon the thousands of his pupils. While at the School they had a profound respect for his character and ability, and they realized that they were sitting at the feet of a master of his subjects. In their after life his precept and example have been, and will continue to be, a constant stimulus to genuine, thorough, and finished work, and a constant safeguard against hasty generalization or dogmatic assertion. His quick sympathy, his unfailing readiness to assist the learner, out of the class-room as well as in it, and his attractive personality, gave him an exceptionally strong hold upon the affections of the young men. Their attitude towards him is well expressed in a letter that came to me this morning from a recent graduate of the School, who describes him as "one of the best known, best liked, and strongest of the Law Professors."

The relations of the law professors are probably closer than those of any other department of the University. No one who has not known, as his colleagues have known, the charm of his

daily presence and conversation, and the delightful quality of his vacation letters, can appreciate the deep and abiding sense of the irreparable loss they have suffered in the death of Professor Thayer.

In our great grief we find our chief comfort in the thought of his simple and beautiful life, greatly blessed in his home and family, rich in choice friendships, crowned with the distinction that comes only to the possessor of great natural gifts nobly used, full of happiness to himself, and giving in abundant measure happiness and inspiration to others.

*J. B. Ames.*

---

The death of James Bradley Thayer will be widely felt.

Few men had more or warmer friends. I have often thought of him as an ideal New Englander. With all the good qualities of the race, he was without the angularity of mind or character which sometimes accompany them. Of perfect good breeding, there was no company to which he was not a welcome addition. He had a breadth of nature, difficult to describe, but impossible not to feel.

He had much public spirit, and threw himself with zeal into those philanthropic movements which attracted him; some of us thought that he was at times called upon to do more than could be fairly asked from him, but he himself never measured the time nor counted the cost.

For nearly thirty years he was Professor in the Harvard Law School. He published two collections of cases, one on Constitutional Law in two large volumes, and one on Evidence in one volume of equal size, both of great excellence; the latter, it is safe to say, is the most successful of the numerous collections of authorities that have been published in the Harvard Law School during the last quarter of the nineteenth century. It is used all over the country.

It will be at another time and in another place that his long line of pupils will tell what they owe to him; to me who may have the honor to succeed him, the aid to be derived from his work is incalculable.

But it is appropriate that I should speak here especially of his historical labors, and it was his historical work that he loved the

best. Its bulk is not large. Mr. Thayer was fastidious, not in judging what others had done, for he was a generous and kindly critic, but in passing upon his own work. To discover or verify a fact which might make his material more complete, to arrange and rearrange that material so that its expression might be more perspicuous, no time or trouble seemed to him too great. But though the pages which he wrote cut no great figure when measured by the base modern standard of so many thousands of words, their quality is high.

The law of evidence is the most characteristic feature of the common law; no part of the law has reacted so strongly upon the English race. In the love of facts, and in the desire of getting those facts at first hand, which distinguish us, the common law of evidence has played a considerable part. Every one knew in a general way that our law of evidence was the offspring of the jury, but only in a general way. Here was Mr. Thayer's good fortune. There was a new country to be discovered, he seized the opportunity, and in the essays afterwards collected, revised, and published in his "Preliminary Treatise on the Law of Evidence," he worked out not only the general lines but the details of the subject in a masterly manner which ultimately satisfied that severest of judges, — himself, — and gave him a distinguished place among those eminent jurists whose contributions to legal history have illustrated the closing years of the last century.

*John Chipman Gray.*

---

The work by which Professor Thayer will be best known to the next generation of lawyers is his "Preliminary Treatise on Evidence at the Common Law." What is the impression which that book will make upon a legal reader who was an entire stranger to the author?

One of the first impressions would relate to the character of the writer. The reader will undoubtedly say that the man who stands behind this book must have been a person of singular modesty and remarkable candor. Here is a man who puts forward original ideas and important views without flourish of trumpets or claiming the merit of discovery; a man who never overstates the case in support of his own theories, and is always careful to give

full space and due weight to the argument opposed to his own views. Every page bears evidence of the quality which Martineau calls "intellectual conscientiousness."

But the competent lawyer who reads this book in the next generation will not stop with the conclusion that it was the work of an honest man. He will say that it proceeds from an intellect which is both profound and patient. He will praise not only the substance, but also the arrangement of the topics. Every brick in the edifice is laid in its proper place, and every brick was carefully rung before it was laid. There was first a careful investigation of authorities; and then a reëxamination of the subject as if it were a new matter.

Professor Thayer goes straight to the fundamentals of the topic. He does not content himself with repeating stereotyped formulas, nor is he satisfied with half solutions of difficulties. On the contrary, he gets behind the ordinary explanations. He does not fall into the mistake, alluded to by Fitzjames Stephen, of supposing that the rules of evidence "had an existence of their own apart from the will of those who made them." Instead, he takes us back to the very birth of these rules, and shows when, why, and how each of them came to be. Nothing can exceed his thoroughness in this respect. I know of nothing which has ever been written on the subject which lets in such a flood of light, nothing which so well brings the student to the right point of view, as some passages in this treatise. Take, for instance, the statement (page 264) that the "excluding function is the characteristic one in our law of evidence;" or, as he puts it in other words (page 266), the rejection on practical grounds "of what is really probative" is "the characteristic thing in the law of evidence;" which, as he felicitously adds, stamps it "as the child of the jury system." Or, again, take his comment on the familiar Latin maxim which briefly tells us that questions of law are for the judge and questions of fact for the jury. Professor Thayer says that this maxim "was never true, if taken absolutely." No doubt it is *only* fact which the jury are to decide (page 187), but there never was any such thing as "an allotting of all questions of fact to the jury. The jury simply decides some questions of fact" (page 185).

Nor would the reader stop with admiring the thought displayed in the Treatise, or with the conviction that the book was the work of an honest man and a profound intellect. He would also admire the style, the words and phrases in which the thoughts are expressed. The writings of Professor Thayer have, in that respect,

a charm which finds its closest recent parallels in the judicial opinions of Lord Bowen and the legal discussions of Sir Frederick Pollock. Right here let me add that the character of a man has a great effect upon his style as an author. We say of Professor Thayer, as has been said of Chief Justice Marshall, that his most marked and distinguished personal trait was simplicity, using that term in its highest and best sense. Dean Swift tells us that faults in style are, nine times out of ten, owing to affectation rather than to want of understanding. When men depart from the rule of using the proper word in the proper place, it is usually done in order "to show their learning, their oratory, their politeness, or their knowledge of the world." "In short," says the Dean, "that simplicity, without which no human performance can arrive to any great perfection, is nowhere more eminently useful, than in this." No motives of vanity or display could ever be attributed to Professor Thayer.

But why did we have from Professor Thayer only a Preliminary Treatise? Why did he spend his strength on that, instead of at once putting forth a practical treatise on the Law of Evidence as now administered by the courts? The answer is to be found in the Introduction to the published work; and it marks both the honesty and the thoroughness of the man. Many years ago he began to write a practical treatise. But after he had made a beginning, he found the need of going largely into the history of the subject, and also making a critical study of certain related topics which overlie and perplex the main subject. He went into those examinations, he spent an immense amount of time upon them; and these tasks occupied all the spare moments of his remaining years. The results are gathered in the published volume; a work of infinite value, which, if he had shrunk from undertaking it, would not have been achieved at all during the present generation. At the conclusion of the Introduction, he said: "I have a good hope of supplementing this volume by another of a more practical character," "giving a concise statement of the existing Law of Evidence." But this hope remains unrealized. "The ploughshare is left in the furrow." The dream of his later years is unfulfilled.

While the profession is grateful for what our friend has given us in the way of legal authorship, yet lawyers will ask each other: Why was not more work completed in all these years and given to the world; why were not his wider plans of book-making fully carried out?



To these questions more than one answer can be given. First : Professor Thayer had an absolute horror of what some one calls "immature authorship and premature publication." We may well apply to him some of the words which Stuart Mill uses in reference to John Austin : "He had so high a standard of what ought to be done, so exaggerated a sense of deficiencies in his own performances," that he accomplished less in the way of authorship than he seemed capable of ; "but what he did produce is held in the very highest estimation by the most competent judges." Professor Thayer is fully entitled to the encomium which the officiating clergyman, at the funeral of Dr. Bishop, pronounced upon that distinguished jurist : "No page, no line, no word ever left this man's hand for the printer, until it was as perfect as he had power to make it."

Another reason for the failure of Professor Thayer to accomplish more in the line of legal authorship is one that is most creditable to his kindly and helpful nature. He repeatedly, we might almost say daily, turned aside from his own work to render assistance to other writers, often to those whose subjects were entirely outside of law. His services as a critic and reviser were frequently sought by friends, and were always cheerfully given. When a manuscript had received the benefit of his revision, it was reasonably certain to be in good taste and in good English. A list of the works whose authors are indebted in this way to Professor Thayer would show why he had not more time for his own books. Instead of concentrating his energies on attaining fame and fortune for himself, he preferred to pause by the wayside in order to render unpaid service to his friends. Those who are familiar with a certain memorial poem of Whittier's cannot but think of the lines :—

" All hearts grew warmer in the presence  
Of one who, seeking not his own,  
Gave freely for the love of giving,  
Nor reaped for self the harvest sown."

Professor Thayer's services as a teacher of law can be best described by those who have been his pupils ; and one of them will speak of him in this REVIEW ; but a few words may be said here. He made teaching his first object. No matter what other work he had on hand, no matter how many previous classes had been carried by him over the same ground, he always made careful preparation for each new meeting of the class. In one respect our friend's innate modesty may have been a disadvantage to him

as a teacher. I suspect that it sometimes led him to refrain from putting due emphasis on his own original views ; and this may have prevented the poorer part of the class from fully appreciating the intrinsic importance of those views. But he kept steadily in sight the salient points and fundamental distinctions, and these were generally grasped and retained by the better men. In this connection I might cite the testimony given to me before Professor Thayer's death by one of his former pupils, who had been out of the Law School seven years. "When we were in the Law School," said he, "we sometimes complained of lack of definiteness on Professor Thayer's part. But now that we have been in practice all this time, we find that what he said stands by us better than what was said by anybody else."

The fear has often been expressed that, with the great increase in the number of Law Students, the personal relation between teacher and pupil would cease to exist. But on the day of Professor Thayer's funeral convincing proof was afforded of the regard in which he was held by his pupils. In the midst of the severest storm of the winter, five hundred students came out to escort the procession from the house to the Chapel.

As a conversationalist I have known only three men whom I should put in the same class with Professor Thayer. There was always the right word and the right turn given to each phrase ; with no appearance of effort ; no display of learning ; and never the remotest suspicion of talking for momentary effect. He was with his pen equal to what he was in speech. He was the one to whom we all turned when memorials and epitaphs were to be written. We all feel to-day that the lips are silent which alone could pay a worthy tribute to such a man.

A welcome guest in all social circles, Professor Thayer was, nevertheless, entitled to the high praise which was bestowed on another eminent Massachusetts lawyer : "That the best wine of his companionship was kept for his own home." And I cannot refrain from adding that it was an ideal home.

Until within a twelvemonth Professor Thayer was a remarkably vigorous man for his years, but he began lately to be conscious of some diminution of physical strength. In July he wrote to me from Bar Harbor that, if he could complete a second volume on Evidence during the next college year, he should be tempted to drop that part of his school work and keep only Constitutional Law ; adding : "If indeed by that time, I be not ripe for going on the shelf entirely." "The head," he said, "seems all right yet, —

so far as I can judge, — but in other regions time is telling. Fast walking and mountain climbing are for others now."

The end came suddenly, but now that the first shock is over, his friends can hardly regret that he was spared the alternative of a long and painful season of ill health. Rather would we say of him: *Felix non tantum claritate vitæ, sed etiam opportunitate mortis.*

*Jeremiah Smith.*

---

In 1885 when I entered the Harvard Law School, Professor Thayer was teaching Criminal Law to the First-year class, Sales and Evidence to the Second-year class, and Constitutional Law to the Third-year class. I studied all these subjects under him, and I can still see clearly before me the teacher of those days. The impression of the first weeks of the course was deepened but not altered in the three years I remained a student. The two most striking characteristics of his teaching were the charming personal courtesy felt in all his discussions with his class, and the painstaking accuracy which he exhibited himself and without which no student, however brilliant, could satisfy him.

Every teacher of large classes must consciously or unconsciously adjust his main efforts to the minds of a portion only of his students. The brilliant, the mediocre, and the dull cannot always get nourishment from the same food. It was to the better men in his classes that Professor Thayer's teaching was chiefly addressed. His desire seemed rather to fathom the depths of the subject before him than by evading difficulties and exceptions to present the simpler outlines of the law in such fashion that the dull and the slow could comprehend them. He was infinitely patient with the poorly gifted, but he did not let the limits of their comprehension define the boundaries of the work in his courses.

In the preface to the Cases on Evidence; Professor Thayer wisely points out that the "case system" is a system of study, not of teaching. The preparation for the regular conferences between the instructor and his pupils is the study of cases. But "as for methods of teaching, that is another matter. These must, indeed, have relation to any particular methods of study that are prescribed or recommended, but they are not necessarily determined by them. In law, as in other things, every teacher has

his own methods, determined by his personal gifts or lack of gifts, — methods as incommunicable as his temperament, his looks, or his manners." In the rooms of some instructors a case has its chief importance as presenting to the mind of the student in a concrete form a question of law which is to be discussed. What the court decided or said about the question is merely a starting-point for analytical discussion. This was not Professor Thayer's method. He had little inclination to develop from his own mind a perfectly logical or entirely consistent body of legal doctrine. If the law as he found it was neither logical nor consistent, the effort of his teaching was to show exactly what the law was, and how it had grown up in this way rather than to work out a more systematic and logical theory than the courts had made. Accordingly, he aimed to bring out the precise legal significance of each case he dealt with. The exact question of law decided by the court was the fundamental thing to be considered, and to this end he was particular to have it carefully noted how the case had been carried to the higher court, and the nice shades of distinction depending on this. I have always thought his analysis of a case more exact and complete than that of any one else I ever knew. He never found more in a case than actually was there, and nothing that was there escaped him. His originality lay chiefly in the depth of his historical research, the accuracy of his restatement of the law, and the logical acumen with which he traced the consequences of a recognized principle. His definition, for instance, of the law of evidence as determining among probative matters what classes of things shall not be received, may seem an obvious matter, yet consistently applied to the whole subject it led to clearer conceptions in many directions.

It was in accordance with his habitual carefulness that he would rarely express an opinion as to a matter which he had not thought over and studied. If a question aside from his subject came up by chance in his class-room, unless he happened to have exact and thorough knowledge on the point, he preferred not to express an opinion, and had no embarrassment in confessing ignorance. But on questions which properly belonged to the subjects which he taught, he had arrived after long study at settled opinions; and these, though always modestly expressed, were firmly held. He was not hasty in reaching a conclusion, but when reached he rarely found cause to change it.

After all has been said in regard to details of manner and method, doubtless the chief reason of Professor Thayer's success

as a teacher, the reason why his courses on Evidence and Constitutional Law, though elective, were taken by one entire class after another, was because he had made himself a master without a peer of those subjects, and the students were aware of this and profited by it. Few indeed of them, however, can have attended his lectures without learning more than the legal doctrines which were the direct objects of their study. Something at least of the accurate and careful habits of mind, the patience in wearisome investigation, the absolute intellectual sincerity, the never-failing kindness and courtesy, which distinguished the teacher, must have borne fruit in the minds and hearts of the pupils.

*Samuel Williston.*